Case No.: PD-0907-17

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

CHRISTOPHER ERNEST BRAUGHTON, JR.
Appellant

v.

THE STATE OF TEXAS,
Appellee.

Decided in the 228th Judicial District Court of Harris County, Texas
Trial Court Cause Number: 1389139, The Honorable Marc Carter, Presiding;
Appealed to the First Court of Appeals, Cause No. 01-15-00393-CR.

CHRISTOPHER ERNEST BRAUGHTON, JR.'S MOTION FOR REHEARING

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To the Honorable Judges of the Court of Criminal Appeals:

Christopher Ernest Braughton, Jr., Appellant, respectfully presents this Motion for Rehearing.

3. ISSUE PRESENTED

***Sole Ground for Rehearing*:**

> This Court's opinion on the jury charge issue relies on the premise that all twelve jurors would have uniformly evaluated a claim that Chris committed felony-deadly conduct. Specifically, the opinion relies on the fact that manslaughter is a greater offense than felony-deadly conduct. But the evidence shows that Chris acted "knowingly" and there was almost no evidence to support a finding that Chris acted "recklessly." Is it true that manslaughter was "just as plausible a theory as felony-deadly conduct?"

4. ARGUMENT

ISSUE PRESENTED FOR REHEARING

I. Ground for Rehearing

The evocative facts of the sufficiency of the evidence argument have eclipsed the comparatively ordinary legal issues of Appellant's claim that the trial court erred in its charge to the jury.

This Court's opinion failed to evaluate the jury charge error in the context of a self-defense case. Chris admitted to acting "knowingly" when he shot toward Dominguez's arm. The question for this Court was whether, in the context of a self-defense case in which Chris admitted to acting "knowingly," "manslaughter was just as plausible a theory as felony-deadly conduct?"

The charge included a requested lesser-included instruction for manslaughter, which has a required mental state of "recklessly" and denied the requested lesser-included instruction for felony-deadly conduct, which has a required mental state of "intentionally" or "knowingly." Tex. Penal Code Ann. §§ 19.02 & 22.05. The decision not to include felony-deadly conduct in the charge left any juror who believed that Chris acted "knowingly," which he admitted to, and criminally—but for some offense other than murder—with the choice of convicting Chris of murder or acquitting him. This is the dilemma that this Court has sought to avoid for many years. *Kachel v. State*, PD-1649-13, 2015 Tex. Crim. App. Unpub. LEXIS 402, *4

(Tex. Crim. App. March 18, 2015) (unpub. op.)(*citing Bignall v. State*, 887 S.W.3d 21, 24 (Tex. Crim. App. 1994)).

II. Intermediate-Appellate Court's Holding

In its re-issued opinion, the intermediate-appellate court held that "[b]ecause manslaughter was just as plausible a theory as deadly conduct, and because the jury rejected manslaughter under the evidence presented, we hold that Chris was not harmed by the trial court's refusal to include his requested instruction on the lesser-included offense of deadly conduct."

III. This Court's Holding

This Court affirmed the intermediate-appellate court's opinion.

This Court's opinion relies on the premise that the twelve individual jurors from this case would have uniformly decided whether to convict Chris of felony-deadly conduct by ranking the severity of the offenses.[1] According to the opinion, because the jurors did not convict Chris of the intermediate-level offense (manslaughter) the jurors would never have convicted Chris of the lesser offense of felony-deadly conduct.

[1] This Court can take judicial notice of the diversity of Harris County, which includes 4.4 million residents, 30% of whom hold a bachelor's degree or higher, 16% of whom live in poverty, and 26% of whom were born outside of the political boundaries of the United States. *See* https://www.census.gov/quickfacts/harriscountytexas (verified on December 26, 2018).

But this Court's opinion relies on the faulty premise that all twelve individual jurors would have evaluated Appellant's issue in this one way. The opinion makes no allowance for the fact that twelve independent minds considered this issue; instead, the opinion assumes that each of the twelve individual jurors relied on the same reasoning as this Court to resolve this issue. This reasoning makes no provision for the fact that one or more jurors could have found that Chris acted "knowingly" and criminally but committed some offense other than murder.

IV. Argument

This Court's approach to ranking the offenses created error. Here, there was almost no evidence that Chris acted "recklessly." Chris testified and he admitted to acting "knowingly" or "intentionally" when he shot toward Dominguez's arm. If a juror believed that Chris acted "knowingly," then that juror would have been precluded from convicting Chris of the lesser-included offense of manslaughter. If this juror also believed that Chris did not commit murder but did commit some other criminal act, then the juror would have been compelled to convict Chris of murder or acquit him. This is the scenario that this Court has endeavored to avoid by finding harm in such circumstances. *Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005). Thus, it cannot be said that "Manslaughter was just as plausible a theory as felony-deadly conduct."

This Court's opinion relies on the faulty assumption that had the trial court included the requested felony-deadly conduct instruction that all of the individual jurors would have evaluated that claim in the same way that this Court did in its opinion. To the contrary, it must be assumed that the individual jurors would have had an array of views on this issue and would have considered it in a variety of ways. The near certainty that twelve independent minds would look at a problem in a variety of different ways is why this Court explained, more than thirty-three years ago:

> [i]f the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is 'calculated to injure the rights of defendant,' which means no more than that there must be some harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.

Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

Here, *Almanza* harm occurred because any juror who had been presented with this issue and decided that Chris (1) acted "knowingly" and (2) committed a criminal offense other than murder was forced to either acquit Chris when the juror believed Chris to be guilty of a criminal act other than murder or to convict Chris of a criminal act that the juror did not believe that Chris committed. Repeatedly, this Court has found this dilemma to be harmful. The Court's opinion evades this conclusion by assuming that all twelve jurors would have uniformly viewed the problem as this Court did. But, when this faulty assumption is removed from the equation, the trial

court's error was harmful under the *Almanza* standard that has governed the resolution of such issues for decades.

V. Conclusion

Accordingly, Chris asks this Court to reverse the intermediate-appellate court's opinion, to vacate the judgment, to conclude that the trial court erred in not granting the requested-lesser-included offense, and to remand this case for a new trial.

5. Conclusion and Prayer

For the reasons stated above, Appellant asks this Court to find that the intermediate-appellate court erred in concluding that the trial court's refusal to issue the requested-lesser-included offense was harmless and to reverse the opinion of the intermediate-appellate court and the judgment of the trial court and the remand this case to the intermediate-appellate court for a full evaluation of Appellant's third issue consistent with the opinion from this Court and to award any other relief that Appellant is entitled to.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Rule 9.8 of the Texas Rules of Appellate Procedure because it is computer generated and does not exceed 2,000 words. Using the word count feature included with Microsoft Word, the undersigned attorney certifies that this brief contains 1,718 words. This brief also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

/s/ Niles Illich
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CERTIFICATE OF SERVICE

This is to certify that on December 27, 2018 that a true and correct copy of this motion was served on lead counsel for all parties in accord with Rule 9.5 of the Texas Rules of Appellate Procedure. Service was accomplished through an electronic commercial delivery service as follows:

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